No. 22060

In the

United States Court of Appeals

For the Ninth Circuit

SCANBE MANUFACTURING CORPORATION,
Appellant,

vs.

WILLIAM TRYON,
Appellee.

BRIEF FOR APPELLANT

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TABLE OF AUTHORITIES CITED

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Jurisdictional Statement

This is an appeal from a habeas corpus proceeding wherein the jurisdiction of the lower court was based on 28 U.S.C. 2241 (c-2) relating to the court's powers to grant writs of habeas corpus [R. 115, line 9]. The appellate jurisdiction of this court is based on 28 U.S.C. 2253, the notice of appeal having been filed by the appellant within the prescribed period [R. 116, 117]. This appeal is from the granting of a writ of habeas corpus releasing the petitioner [R. 112, 115] and was entered on June 1, 1967, by the Honorable Sherrill Halbert, Judge for the Eastern District of California, sitting in the U. S. District Court for the Central District of California, by

designation of the chief judge of the Court of Appeals for the Ninth Circuit, The Honorable Richard H. Chambers, pursuant to the provisions of 28 U.S.C. 292(b) [R. 15]. The petition was originally filed in this court on behalf of the appellee by one, Edward E. Simmons, Jr., and transferred to the Central District of California by Chief Judge Chambers [R. 137].

Statement of the Case

A. Background

The foundation of the appellee's incarceration is a complaint for patent infringement in the district court with the court assuming jurisdiction under the provisions of 28 U.S.C. 1338(a) [R. 42, 43], Civil Action 65-784. A judgment for patent infringement was entered in the action on January 6, 1966, with an ORDER that an injunction issue in favor of appellant enjoining appellee from infringing the patent in suit [R. 28, 30]. Pursuant thereto the injunction [R. 24] was issued and served on the appellee [R. 27]. Following the service of the injunction, a judgment for civil contempt against the appellee was entered on April 3, 1967 [R. 20]. As a result of the failure to comply with the civil contempt judgment, the appellee was conditionally imprisoned pursuant to an ex parte order for his arrest [R. 19]. During this imprisonment, the petition for habeas corpus was filed on behalf of appellee by one, Edward E. Simmons, Jr. The proceeding on habeas corpus is the subject matter of the appeal before this court.

B. Habeas Corpus Proceedings

During the habeas corpus proceedings, the appellee was initially released from his conditional imprisonment for contempt, on bail, by the Honorable Sherrill Halbert until final order of the court [R. 58]. Pending the final order of Judge Halbert, appellant filed evidence of new and continued violation of the injunction by the appellee [R. 84, 85, 99] rather than any attempt to purge himself of contempt.

Upon Judge Halbert's final order, it was determined by him that the injunction was void *per se* and that the judgment for contempt based on such an injunction cannot stand, therefore concluding that the appellee's custody was unlawful [R. 115, lines 11-14].

The injunction was void *per se* in the opinion of the lower court in that it did not contain a judicial signature and indicated as follows:

> "Absent some clear authority, which has not been brought to my attention, I am of the view that the injunction signed only by a deputy clerk of the District Court is void." [R. 114, lines 18-21].

The lower court further determined that it had jurisdiction to grant the writ of habeas corpus for the conditional imprisonment under 28 U.S.C. 2241(c)(2) [R. 115].

The result of the proceedings was that the appellee was released forthwith and appellant filed the appeal to this court.

C. Statutes involved

1. 28 U.S.C. 1338(a)
2. 28 U.S.C. 2241(c)(2)
3. 28 U.S.C. 2253
4. 28 U.S.C. 1691 which reads as follows:
   "All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof."
5. 35 U.S.C. 283
6. Federal Rules of Civil Procedure 54
7. Federal Rules of Civil Procedure 65

Specification of Errors

1. The court erred in releasing the petitioner, William Tryon, from custody on bail pursuant to his imprisonment resulting from a decree holding petitioner in civil contempt for willful violation of an injunction in Civil Action 65-784-PH.

2. The court erred in its determination that the injunction issuing from the proceedings in Civil Action 65-784-PH is void as a matter of federal law since it was signed by a clerk of the district court and did not contain a judicial signature.

3. The court erred in its determination that it has jurisdiction to grant a petition for a writ of habeas corpus as a result of the petitioner's incarceration from a decree holding petitioner in civil contempt for violation of an injunction issuing from Civil Action 65-784-PH.

ARGUMENT

A. No Right of Bail For Imprisonment Resulting From Civil Contempt.

The right of bail has been traditionally employed to allow an individual to gain his freedom pursuant to the determination of his rights. The imprisonment for civil contempt is a coercive measure for the purposes of forcing the contemner to comply with the court order, in this instance implemented by means of the writ of injunction. For one district court judge to release a prisoner from imprisonment from contempt, on bail, is to go against the very heart of the coercive measure ordered by the previous district court judge and in effect reverses his judgment. It would appear that the proper measure for release of a prisoner held in civil contempt had long been established in *In Re Nevitt* (CA-8, 1902) 117 F. 448, 461, wherein it is stated as follows:

> "They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets."

Parker v. *U. S.* (CA-1, 1946) 153 F.2nd 66, 70; *Securities and Exchange Commission* v. *Penfield Co. et al.* (CA-9, 1946) 157 F.2d. 65, 66; *Penfield Co. of California* v. *Securities and Exchange Commission,* 330 U. S. 585. Also note *U. S.* v. *Fitzpatrick,* (CA-2, 1964) 330 F.2d 953 in a

similar habeas corpus proceeding relative to bail and imprisonment for contempt.

B. Federal Law Allows the Clerk of the District Court to Sign Writs of Injunction.

During the course of the habeas corpus proceedings, the district judge requested comments of all counsel with respect to the matter of an injunction being signed only by a clerk of court [R. 113, lines 5-8] and no counsel uncovered federal statute 28 U.S.C. 1691 [R. 114, lines 18, 19]. The judge himself did not uncover this statute as is evident by the order under appeal. 28 U.S.C. 1691 reads as follows:

> "All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof."

It appears that this statute clearly covers the writ of injunction reviewed by the district court thereby rendering it valid as a matter of federal law, contrary to the opinion expressed in the district court's MEMORANDUM AND ORDER under appeal. This statute further cross-references the writ of injunction and Federal Rule of Civil Procedure 65.

The writ of injunction is itself authorized by 35 U.S.C. 283.

The application for writ of habeas corpus overlooked the important fact that the original judgment and injunction issuing out of this court was appealed by the appellee to the United States Court of Appeals for the Ninth Circuit and that appeal was dismissed by order of this court on December 1, 1966. The judgment from the Ninth Circuit Court of Appeals issued on the district court on or about January 31, 1967, and the mandate was spread by the United States District Court, Central District of California on February 10, 1967. Accordingly, the original judgment and injunction are not appealable matters.

Since the judgment and injunction are final and not appealable, any defenses going behind the original judgment are closed to the appellee at this time. It is respectfully submitted that the issues relating to the merits of the original judgment are comprehended by the doctrine of res judicata; *Chicot Co. Drainage District* v. *Baxter State Bank.* (CA-8, 1940) 308 U. S. 371, 378. The relevant portions of page 378 read as follows:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principal that res judicata may be pleaded as a bar, not only as matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end'. (citing cases)"

In the Chicot decision, Chief Justice Hughes stated that res judicata could be successfully pleaded even though in a subsequent case the act involved in the earlier decree was held to be unconstitutional. Also note *Thomas* v. *Cincinnati, N. O. & T.P. Ry. Co., In re Phelan* 62 F. 803, 823.

C. The Writ of Habeas Corpus Is the Improper Proceeding to Test the Judgment for Civil Contempt.

The propriety of this entire habeas corpus proceeding based on the petitioner's conditional imprisonment for civil contempt is also in issue. It is respectfully submitted that the writ of habeas corpus cannot be properly employed to contest the judgment for civil contempt and the resulting conditional imprisonment; *Bowen* v. *Johnston* 306 U. S. 19; *Stewart* v. *Dunn* (CA-5, 1966) 363 F.2d 591, 597.

The proper procedure in this matter was an appeal from the judgment of civil contempt to the United States Court of Appeals of the Ninth Circuit and not by the habeas corpus proceeding. *Craig* v. *Hecht* 263 U.S. 255, 277. Also note *In Re Swan* 150 U.S. 637; and *U.S.* v. *Pridgeon* 153 U.S. 631. In this latter case the court's discussion is particularly relevant to the appellant's position when it indicated at 153 U. S. page 637 as follows:

> "Under a writ of habeas corpus the inquiry is addressed not to errors but to the question whether the proceedings and the judgment rendered therein, are for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge."
>
> . . . . . .
>
> ". . . There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void."

It is respectfully submitted that even though a statute is held to be unconstitutional, disobedience of an order made prior to such holding is punishable by contempt; *Locke* v. *United States* (CA-5, 1935), 75 F.2nd 157, 160, cert. den. 295 U.S. 733. In the Locke case an order was made directing compliance with the Oil Code which was later held unconstitutional in *Panama Refining Company* v. *Ryan* 293 U.S. 388. After the act was held unconstitutional, a contempt proceeding was started against Locke and the contempt was sustained.

The other aspect of this case is that despite the validity or invalidity of the writ of injunction, it was founded on a valid judgment which ordered the issuance of the writ of injunction. The judgment contains the identical prohibitions that the writ of injunction recites and the appellee had full knowledge thereof. In this connection,

attention is respectfully directed to this court's decision of *Tanner Motor Livery, Ltd.* v. *Avis, Inc.* (1963) 316 F.2d 804, 810, wherein it indicated as follows:

> ". . . Orders of United States Courts, deliberately made, after proper notice and hearing, and subject to review by this Court, are not to be lightly changed by any judge of the trial court."

The United States Supreme Court's most recent consideration of the matter of contempt was in *Walker* v. *City of Birmingham*, .. US .., 18 L.ed 2d 1210, 87 S. Ct. ... decided June 12, 1967, involving Dr. Martin Luther King, among others. The closing sentence of the majority opinion serves to close this brief as well, wherein it was indicated as follows:

> ". . . But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."

CONCLUSION

Because of the reasons set out above, it is respectively submitted that the trial court erred on each of the specifications of error including holding the injunction void because it was signed by the court clerk and not by a judicial officer. This court, then, is required to hold that all of the judgments and the injunction against the appellee are all valid and that he be conditionally recommitted for contempt until he has purged himself of contempt.

Respectfully submitted,

Edward J. DaRin

Attorney for Appellant
Scanbe Manufacturing Corporation

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edward J. DaRin

APPENDIX

All exhibits were introduced by attachment to documents on file and accordingly each exhibit is referenced as to its page in the Record: